

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Arturo Soltero,

10 Plaintiff,

11 v.

12 OneWest Bank FSB,

13 Defendant.

No. CV-13-0277-PHX-DGC

ORDER

14
15 Pro se Plaintiff Arturo Soltero filed a quiet title action against Defendant OneWest
16 Bank FSB relating to the alleged foreclosure and trustee sale of property located at 2873
17 North 144th Drive, Goodyear, Arizona, 85338 (the “Property”). Doc. 1-1 at 5-11, ¶¶ 8,
18 19. Defendant removed the action to federal court (Doc. 1) and filed a motion to dismiss
19 (Doc. 4). The motion is fully briefed. Docs. 9 & 11. No party has requested oral
20 argument. For the reasons that follow, the Court will grant the motion.

21 **I. Legal Standard.**

22 When analyzing a complaint for failure to state a claim to relief under Rule
23 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
24 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
25 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the
26 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are
27 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*
28 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the

1 complaint must plead enough facts to state a claim to relief that is plausible on its face.
2 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not
3 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
4 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
5 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere
6 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the
7 pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

8 Absent specific exceptions, the Court will not consider evidence or documents
9 beyond the complaint in the context of a Rule 12(b)(6) motion to dismiss. *See United*
10 *States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). “If, on a motion under Rule
11 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the
12 court the motion must be treated as one for summary judgment under Rule 56.”
13 Fed. R. Civ. P. 12(d). “A court may, however, consider certain materials – documents
14 attached to the complaint, documents incorporated by reference in the complaint, or
15 matters of judicial notice – without converting the motion to dismiss into a motion for
16 summary judgment.” *Ritchie*, 343 F.3d at 908 (citations omitted); *see also Knievel v.*
17 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (noting that the court may take into account
18 documents “whose contents are alleged in a complaint and whose authenticity no party
19 questions, but which are not physically attached to the [plaintiff’s] pleading.”).

20 Defendant attached two documents to its motion to dismiss: (1) the Note (Ex. A,
21 Doc. 4-1 at 2-10); and (2) the Deed of Trust (“DOT”) (Ex. B, Doc. 4-1 at 12-33).
22 Plaintiff did not physically attach these documents to the complaint, but the complaint
23 alleges their content and the documents are central to Plaintiff’s quiet title claim.
24 Doc. 1-1 at 5-11, ¶¶ 3-7, 14-18. Plaintiff’s response does not contest the authenticity of
25 the documents. Doc. 9. Accordingly, the Court will consider the Note and the DOT
26 under the incorporation by reference doctrine.

1 **II. Analysis.**

2 **A. Failure to Respond.**

3 The Court's February 28, 2013, order noted that Plaintiff had failed to file a timely
4 response to the motion to dismiss. Doc. 8. The order provided Plaintiff with until
5 March 15, 2012, to file a response and warned that the Court would summarily grant the
6 motion to dismiss if Plaintiff failed to comply with the order. *Id.* Plaintiff did not file a
7 response until March 18, 2013. Doc. 9. Plaintiff's failure to respond in accordance with
8 the Court's order provides sufficient reason for the Court to grant Defendant's motion to
9 dismiss. In light of Plaintiff's status as a pro se litigant, however, the Court will consider
10 the merits of the complaint.

11 **B. Merits of Complaint.**

12 Plaintiff makes a claim for quiet title, requesting the Court declare that title to the
13 Property is vested in Plaintiff alone and that Defendant does not have any interest in the
14 Property. Doc. 1-1 at 5-1, ¶ 1; *id.* at 9. A party bringing a quiet title action must allege
15 that it has an interest in real property and that the interest is adverse to another person
16 who claims an interest in the same property. A.R.S. § 12-1101(A). The complaint
17 alleges that Defendant does not have a security interest in the Property (Doc. 1-1 at 5-11,
18 ¶¶ 24-26) because the assignment of the DOT and the Note to Defendant was not
19 perfected (*id.*, ¶ 22), thereby rendering "Plaintiff's interests [in the Property] superior to
20 the interest of the Defendant's, and the lien of Defendant and any subsequent mortgage
21 assignment and rents may be avoided" (*id.*, ¶ 23).

22 Defendant raises the following arguments in support of its motion to dismiss:
23 (1) Plaintiff lacks standing to challenge the validity of an assignment of the Note and
24 DOT; (2) as trustor, Plaintiff does not have a right to bring a quiet title claim under
25 Arizona law; (3) the complaint fails to state a quiet title claim because there is no
26 allegation that Plaintiff has paid or tendered all amounts owed; (4) Arizona law rejects
27 the "show-me-the-note" theory; (5) Defendant is the beneficiary under the DOT because
28 Defendant is in possession of the Note, which is indorsed in blank; and (6) the complaint

1 does not state a plausible claim. Doc. 4 at 2. The Court will consider each in turn.

2 First, to the extent Plaintiff's claim is based on the validity of the assignment of
3 the Note and the DOT, this Court has held that borrowers who were not parties to the
4 assignment lack standing to challenge the assignment's validity. *See In Re MERS Litig.*,
5 MDL Doc. No. 09-2119-JAT, 2011 WL 4550189, *5 (D. Ariz. Oct.03, 2011) (finding
6 that borrowers who were not parties to the assignment of their deed lacked standing to
7 challenge the assignment's validity because they had not alleged a "concrete and
8 particularized injury that is fairly traceable to the challenged assignment."); *see also*
9 *Graham-Miller v. Nationstar Mortg. LLC*, No. CV-11-00848-PHX-JAT, 2012 WL
10 2368494, *4 (D. Ariz. June 21, 2012). Plaintiff does not allege facts sufficient to confer
11 standing to challenge the assignment.

12 Second, "[i]t is thoroughly settled that a complaint to quiet title . . . [must] show
13 title in the plaintiff[.]" *Verde Water & Power Co. v. Salt River Valley Water Users'*
14 *Ass'n*, 197 P. 227, 228 (Ariz. 1921). Under Arizona law, legal title passes to the trustee
15 upon the execution of a DOT. *Brant v. Hargrove*, 632 P.2d 978, 984 (Ariz. Ct. App.
16 1981) (citations omitted). As trustor under the DOT (Ex. B, Doc. 4-1 at 12), Plaintiff
17 does not hold title and thus cannot bring a quiet title claim. *See Robertson v. DLJ Mortg.*
18 *Capital, Inc.*, No. CV-12-8033-PCT-LOA, 2012 WL 4840033, *8 (D. Ariz. Oct. 11,
19 2012) ("Under Arizona law, neither a mortgagee nor a trustor can bring an action to quiet
20 title because neither holds title." (citations omitted)). Although Plaintiff alleges that his
21 interests are "superior to the interest of the Defendant's" (Doc. 1-1 at 5-11, ¶ 23),
22 Plaintiff has not pled that he has title and the DOT shows otherwise.

23 Third, it is well established in Arizona that "a plaintiff cannot bring a quiet title
24 action unless [he] has paid off her mortgage in full." *Bergdale v. Countrywide Bank FSB*,
25 No. CV-12-8057-PCT-GMS, 2012 WL 4120482, *6 (D. Ariz. Sept. 18, 2012) (citing
26 *Farrell v. West*, 114 P.2d 910, 911 (Ariz. 1941) ("[I]f it appears there is an unsatisfied
27 balance due a defendant-mortgagee, or his assignee, the court will not quiet the title until
28 and unless [the plaintiff-mortgagor] pays off such mortgage lien.")); *Eason v. Indymac*

1 *Bank, FSB*, No. CV 09-1423-PHX-JAT, 2010 WL 1962309, *2 (D. Ariz. May 14, 2010)
 2 (action to “[q]uiet title is not a remedy available to the trustor until the debt is paid or
 3 tendered.”); *Frazer v. Millennium Bank*, No. 2:10-01509 JWS, 2010 WL 4579799, *4
 4 (D. Ariz. Oct. 29, 2010) (same). The complaint does not allege that Plaintiff has paid or
 5 tendered all amounts owed on the Note, and the facts of this case strongly suggest he has
 6 not.

7 Fourth, the Arizona Supreme Court has rejected the “show me the note” theory
 8 and its requirement that a party must be in possession of the actual note in order to
 9 foreclose. *Hogan v. Wash. Mut. Bank. N.A.*, 277 P.3d 781, 782 (Ariz. 2012) (noting that
 10 Arizona statutes do not require “that before a trustee may exercise that power of sale, the
 11 beneficiary must show possession of, or otherwise document its right to enforce, the
 12 underlying note.”); *see also Diessner v. Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d
 13 1184, 1187 (D. Ariz. 2009) (“[D]istrict courts have routinely held that Plaintiff’s ‘show
 14 me the note’ argument lacks merit.”). Plaintiff’s claim lacks legal authority to the extent
 15 it seeks to require Defendant to prove that it is the holder of the Note. *See* Doc. 1-1 at 5-
 16 11, ¶¶ 1, 19.

17 Fifth, the holder of a note indorsed in blank, A.R.S. § 47-3205(B) (providing a
 18 note indorsed in blank is “payable to the bearer and may be negotiated by transfer of
 19 possession alone”), is “[t]he person in possession of a negotiable instrument[,]”
 20 A.R.S. § 47-1201(B)(21)(a). Defendant submits that Plaintiff is not entitled to quiet title
 21 because Defendant is in possession of the Note. Doc. 4 at 7. The complaint alleges that
 22 Defendant is the holder of the Note (Doc. 1-1 at 5-11, ¶¶ 15-18), but that the Note is no
 23 longer secured by the DOT because “the note and the [DOT] were assigned to different
 24 parties; whereby a split of the note and [DOT] has occurred that nullifies Defendant’s
 25 security interest (if any) in the said [DOT] and the subsequent assignments” (*id.*, ¶ 17).
 26 This theory does not comport with Arizona law. By operation of law, the transfer of a
 27 contract secured by a trust deed “shall operate as a transfer of the security for such
 28 contract.” A.R.S. § 33-817; *see also Cervantes v. Countrywide Home Loans, Inc.*, 656

1 F.3d 1054, 1044 (9th Cir. 2011) (“Even if we were to accept the plaintiffs’ premises that
 2 . . . the note is split from the deed, we would reject the plaintiff’s conclusion that, as a
 3 necessary consequence, no party has the power to foreclose.”). Plaintiff’s claim is
 4 untenable to the extent it is based on the allegation that Defendant possesses a non-
 5 securitized Note.

6 Sixth, Plaintiff has failed to plead sufficient facts to state a plausible quiet title
 7 claim. Plaintiff has not alleged that he has an interest in the real property at issue.
 8 Plaintiff alleges that he “is the owner” of the property (Doc. 1-1 at 5-11, ¶ 8), but this is a
 9 legal conclusion unsupported by any properly alleged fact. Plaintiff does not allege that
 10 he has made any payments under the Note or any other fact sufficient to show that he has
 11 an interest in the Property. Accordingly, the Court will grant the motion to dismiss.

12 **III. Leave to Amend.**

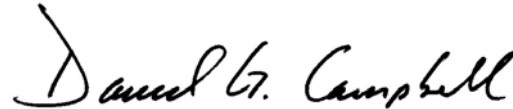
13 Pro se Plaintiffs should be granted leave to amend if the defects in their claims can
 14 be cured by re-pleading. Plaintiff asserts that “any defects alleged by the Defendant can
 15 be cured . . . by filing an amended pleading.” Doc. 9 at 5. Leave to amend should be
 16 freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). The Court cannot
 17 determine that an amendment could not cure the complaint’s deficiencies (specifically,
 18 with respect to the amount Plaintiff may or may not have paid on the Note) and therefore
 19 will grant leave to amend. As to theories alleged that are without legal foundation (show
 20 me the note, and splitting of the Note and DOT), the Court dismisses allegations related
 21 to these theories with prejudice. If Plaintiff chooses to file an amended complaint, he
 22 may not advance legal claims based on these theories.

23 **IT IS ORDERED:**

- 24 1. Defendant’s motion to dismiss (Doc. 4) is **granted**.
- 25 2. Plaintiff has **30 days** from the date of this order to file a first amended
 26 complaint. Failure to do so will result in the Court dismissing the action
 27 with prejudice and directing the Clerk to enter judgment accordingly.
- 28 3. The Case Management Conference set for **May 3, 2013 at 3:00 p.m.** is

1 **vacated**, and will be rescheduled if Plaintiff files an amended complaint.

2 Dated this 3rd day of May, 2013.

3
4 

5
6 _____
7 David G. Campbell
8 United States District Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28